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(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR Part 531

Docket No. 05-05

RIN 3072-AC31

Non-Vessel-Operating Common Carrier Service Arrangements

Agency: Federal Maritime Commission.

Action: Final Rule.

Summary: The Federal Maritime Commission has revised its exemption for non-vessel-operating common carriers (NVOCCs) from certain tariff requirements of the Shipping Act of 1984 to allow NVOCCs and shippers' associations with NVOCC members to act as shipper parties in NVOCC Service Arrangements.

Effective Date: **October 28, 2005**

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Supplementary Information:

I. Background

On August 3, 2005, the Federal Maritime Commission (“FMC” or “Commission”) proposed a revision to its regulations at 46 CFR Part 531, Non-Vessel-Operating Common Carrier Service Arrangements. 70 Fed. Reg. 456267 (August 8, 2005)(“NPR”). The NPR proposed revisions to 46 CFR sections 531.3(o), 531.5(a), 531.6(c)(2), and 531.6(d) that would have the effect of allowing non-vessel-operating common carriers (“NVOCCs”) to act as either shippers or carriers in an NVOCC Service Arrangement (“NSA”). Id.

On January 19, 2005, 46 CFR Part 531 became effective, exempting NVOCCs from certain tariff publication requirements of the Shipping Act of 1984, 46 U.S.C. app. 1701 et seq. (“Shipping Act”). 69 Fed. Reg. 75850 (December 20, 2004)(final rule)(“NSA Rule”). The NSA Rule was issued pursuant to the Commission’s authority under section 16 of the Shipping Act, 46 U.S.C. app. 1715 (“Section 16”). The exemption relieved NVOCCs from certain tariff requirements of the Shipping Act, provided the carriage in question was done pursuant to an NSA filed with the Commission and the essential terms are published in the NVOCC’s tariff. Id.

The NSA Rule defined an “NSA shipper” as a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, or a shippers’ association. 46 CFR 531.3(o). This definition specifically excluded NVOCCs and shippers’ associations with NVOCC members. As discussed below, this Final Rule now removes the limitation from

the NSA Rule to allow NVOCCs and shippers' associations with NVOCC members to act as "NSA shippers."

II. Summary of the Comments

The Commission received eight comments in response to the NPR from: United States Department of Transportation ("DOT"); American Institute for Shippers' Associations, Inc. ("AISA"); International Shippers' Association ("ISA"); Fashion Accessories Shippers' Association ("FASA"); BDP International, Inc. ("BDP"); Agriculture Ocean Transportation Coalition, BAX Global, Inc., FedEx Trade Networks Transport & Brokerage, Inc., the National Industrial Transportation League, North Atlantic Alliance Association, Inc., Transportation Intermediaries Association, and United Parcel Service (collectively, "Joint Commenters"); Carotrans International, Inc. ("Carotrans"); and the World Shipping Council ("WSC").

A. Comments in support

Comments supporting the adoption of the NPR were received from NVOCCs, shippers' associations with NVOCC members and the U.S. Department of Transportation. The overwhelming majority of the commenters support the revision as proposed in the NPR. DOT at 1; ISA at 1; AISA at 2; BDP at 1; Joint Commenters at 1; Carotrans at 6.

1. Commission has adequate statutory authority

Carotrans, BDP and the Joint Commenters assert the Commission has sufficiently broad authority to adopt the changes proposed in the NPR and that the proposal meets the criteria of Section 16. Carotrans at 2; BDP at 1-2; Joint

Commenters at 2, 4. The Joint Commenters attest that the voluminous record developed in the proceeding leading to the adoption of the NSA Rule also adequately supports this proposal. Joint Comments at 4.

2. Section 16 criteria are met

DOT, Carotrans, BDP and the Joint Commenters assert that the proposed revisions meet the two-part test of Section 16 inasmuch as the proposal would neither cause substantial reduction in competition nor be detrimental to commerce. DOT believes that shippers' associations are unlikely to effectively coordinate resale of space obtained via an NSA. DOT at 3. DOT asserts the revision will "predictably enhance competition without detriment to commerce." DOT at 3.

a. No substantial reduction in competition

Carotrans and BDP further argue that the proposal will not result in a substantial reduction in competition. Carotrans at 4; BDP at 4. Rather, these commenters assert, competition at many levels of the international transportation industry will be stimulated by it. Carotrans at 4-5; BDP at 4-5. "The carrier-to-shipper NVO[CC] relationships which have naturally proliferated in the marketplace will now evolve into more competitive relationships in a confidential NSA environment" due to the greater flexibility NSAs afford over tariff-based structures. Carotrans at 5; BDP at 5. These commenters believe that much of this is due to the confidential aspects of NSAs and predict that "competition will flourish based on real commercial factors and not on the basis of transparencies of the tariff mechanism." Id.

The Joint Commenters assert that “removal of the restrictions . . . will foster greater competition in the industry by permitting NVOCCs to compete against vessel-operating common carriers (“VOCCs”) in securing the business of both individual NVOCCs (acting as shippers) and shippers’ associations with NVOCC members.” Joint Commenters at 2. Without the adoption of the proposed changes, the Joint Commenters argue, VOCCs will continue to “enjoy a distinct commercial advantage” over NVOCCs. Joint Commenters at 2-3.

b. No detriment to commerce

Carotrans and BDP argue adoption of the NPR will not be detrimental to commerce because the Commission’s regulations already provide that NVOCCs may deal with each other in co-loading arrangements rated under tariffs. Carotrans at 3; BDP at 3. These NVOCCs assert that the NPR’s extension of co-loading practices into more formal contractual arrangements will stabilize those practices, and ultimately result in better pricing opportunities for shippers because NVOCCs will be better able to aggregate cargo to negotiate more favorable rates and terms with VOCCs. Id. Carotrans and BDP believe the Commission’s rationale expressed with respect to VOCC service contracts is equally applicable to NSAs between NVOCCs and therefore “patently not detrimental to commerce at any level.” Carotrans at 3-4; BDP at 3-4.

B. Comment in opposition

FASA is the sole commenter that opposes adoption of the NPR. FASA at 2. FASA argues the Commission lacks the statutory authority under Section 16 to have adopted 46 CFR Part 531 originally. Id. at 1-2. FASA re-submits the

comments it had made on the NSA Rule. FASA at 1.

In comments dated September 29, 2004, FASA urged the Commission to either reject an industry proposal for a conditional exemption or initiate a new proceeding and re-open the record to “afford the further opportunity to develop a record specifically addressed to the proposed conditional exemption.” FASA comments of September 29, 2004 at 2. FASA observed that “diverse segments of the ocean transportation industry” had “repeatedly stressed” that the petitions, and the joint comments, involved fundamental issues of the Commission’s statutory exemption authority. Id. FASA urged that the “Commission’s deliberation should not be compromised by the premature adoption now of the conditional exemption.” Id.

FASA also expressed its belief that the arguments it had raised had not been addressed. Id. Specifically, FASA argued that the (then-proposed) NSA Rule was inconsistent with the statutory scheme of the Shipping Act, as revised by the Ocean Shipping Reform Act of 1998 (“OSRA”) because (1) it might free NVOCCs from the requirement that they publish tariffs; (2) it might lead to the result of shippers’ associations being required to seek redress of grievances outside the FMC; and (3) it might enable NVOCCs to undertake otherwise prohibited actions under section 10 of the Shipping Act. Id. at 4-5. Finally, FASA argued a conditional exemption would put shipper/customers at risk of “dead freight” for not meeting a minimum volume commitment to an NVOCC under an NSA, although the NVOCC might have already met its volume commitment to the VOCC by aggregating other cargo. Id. at 5.

In comments filed in response to the Commission's October 31, 2004 Notice of Proposed Rulemaking, 69 Fed. Reg. 63981 (November 3, 2004), FASA asserted that exemption from the tariff publication requirements of the Shipping Act, whether or not conditional upon filing of an NSA, was not appropriate under Section 16. FASA comments of November 19, 2004 at 2. FASA, however, suggested several additions and revisions to that proposal.¹ Id. at 3-5.

C. Comments of the World Shipping Council

WSC takes no position as to whether the proposed amendments would be consistent with Section 16. WSC at 1. WSC is concerned, however, that the proposed rule may enable NVOCCs to avoid the obligations they have as common carriers under the regulations of U.S. Customs and Border Protection ("CBP"), specifically 19 CFR 4.7(b)(2) ("24-Hour Rule") (requiring carriers to submit vessel manifests to CBP at least 24 hours prior to lading at the foreign port). Id. WSC therefore recommends that the Commission clarify that nothing in this rule may be interpreted to release NVOCCs from their duties as "carriers" under the 24-Hour Rule, even when acting as "shippers" with respect to other NVOCCs. Id. at 3.

¹ FASA had suggested that the Commission adopt additional prohibitions in the NSA Rule mirroring section 10(c)(8), 46 U.S.C. app. 1709(c)(8), to prohibit NVOCCs offering NSAs from discriminating against shippers' associations or ocean transportation intermediaries based on status. The Commission did not adopt this recommendation because, with the exception of affiliates, the NSA Rule neither contemplates nor sanctions any concerted NSA activity. See NSA Rule, 69 Fed. Reg. at 75851-75852. See also Docket No. 04-12, Non-Vessel-Operating Common Carrier Service Arrangements, 70 Fed. Reg. See Docket No. 05-06, Non-Vessel-Operating Common Carrier Service Arrangements (August 30, 2005)(Notice of Inquiry)(requesting public comment on joint unaffiliated NVOCC-offered NSAs).

III. Discussion

Section 16 authorizes the Commission, “upon application or on its own motion . . . to exempt for the future any . . . specified activity of [persons subject to the requirements of the Shipping Act] from any requirement of this Act if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce.” 46 U.S.C. app. 1715. Section 16 also authorizes the Commission to “attach any conditions to any exemption.” Id. As it did when originally proposing the NSA Rule in late October, 2004, the Commission again notes that Section 16 authorizes the Commission to exempt by rule or order matters it regulates under the Shipping Act. See 69 Fed. Reg. 63981, 63985 (November 3, 2004)(matter concerns “specified activity” subject to a “requirement” of the Shipping Act as those terms are used in Section 16). The Commission continues to believe that the NSA Rule falls within its exemption authority and comports with the goals of the Shipping Act and Congress’s legislative intent as expressed most recently by OSRA. We note that 46 CFR Part 531 does not completely exempt NVOCCs from the tariff publication requirements of the Shipping Act, as some commenters in the original proceeding had urged. We again disagree with FASA’s assertion that the exemption is beyond the Commission’s authority to exercise. See 69 Fed. Reg. at 63985.

The Commission is mindful that the authority of Section 16 can be exercised only when the Commission finds that such action will result neither in substantial reduction in competition nor be detrimental to commerce. 46 U.S.C.

app. 1715. The Commission has now, through publication and request for comment, sought information to help it determine whether the proposed revision to 46 CFR Part 531 would cause either of these untoward effects. As explained more fully below, the Commission finds the proposed revision would cause neither substantial reduction in competition nor be detrimental to commerce.

A. Section 16 Criteria

1. Substantial Reduction in Competition

The Commission has evaluated the possible impact of its proposal on competition between NVOCCs, between NVOCCs and VOCCs, and between shippers' associations. Most commenters suggest that the NPR, which would allow NVOCCs and shippers' associations with NVOCC members to act as NSA shippers, will not result in a substantial reduction in competition among any of these groups. As Carotrans points out, NVOCCs may already deal with each other commercially in shipper-to-carrier co-loading arrangements subject to the Commission's tariff rules. Indeed, rather than reducing competition, NSAs among NVOCCs may lead to a more competitive environment for NVOCCs who serve other NVOCCs.

Similarly, the Commission finds persuasive the assertions of AISA, ISA and DOT that allowing shippers' associations with NVOCC members to act as NSA shippers will not result in substantial reduction in competition among shippers' associations, nor will it have an effect on the resale of space that NVOCCs may obtain as members of a shippers' association. We are persuaded

that, as DOT phrases it, this “leveling of the playing field” for all shippers’ associations will enhance competition.

Furthermore, recent case law gives us some assurance that courts are not likely to find that NVOCCs acting concertedly in NSAs to be immune from the prohibitions of the antitrust laws. United States v. Gosselin World Wide Moving, N.V., 411 F.3d. 502 (4th Cir 2005). Therefore, the Commission’s previous concerns, that allowing NVOCCs to act as both shipper and carrier parties in an NSA would create a potential for reduction in competition through immunity from the antitrust laws, have been largely alleviated.

Moreover, as Carotrans and BDP assert, the Commission’s regulations have recognized and provided for the sale of ocean transportation services by one NVOCC acting as carrier to another acting as shipper under tariff regulations. See 46 CFR 520.11(c)(iii)(co-loading). Although this Final Rule addresses basically the same commercial relationship, it should, as the commenters suggest, provide greater flexibility over such transactions done under a tariff.

2. Detriment to Commerce

We find that the Final Rule will not be detrimental to commerce. See 69 Fed. Reg. 63987 (discussion of criterion). Neither the original rulemaking nor this Final Rule eliminates the requirement that common carriers publish tariffs and adhere to rates that are either published in tariffs or filed in NSAs. Principles of common carriage inherent in the Shipping Act are preserved by the continuing application of all of the prohibitions contained in section 10 of the Shipping Act,

46 U.S.C. app. 1709, e.g., against retaliation, deferred rebates, unreasonable refusals to deal, etc. Accordingly, the protections provided to the shipping public will be preserved and detriment to commerce will not occur.

The Joint Comments assert that the proposal will promote commerce by expanding the opportunity for NVOCCs acting as shippers to choose their service provider and will ultimately lead to greater commercial efficiencies. We are persuaded by the comments that no detriment to ocean commerce will arise from extending the exemption of 46 CFR Part 531 to enable NVOCCs to provide all their customers, whether they be other NVOCCs or beneficial cargo owners or shippers' associations, with NSAs tailored to meet the individual needs of those customers. We believe that not only will the exemption not be detrimental to commerce as required by Section 16, but there may also be merit to the assertion that the expansion of the exemption will prove beneficial to commerce.

In summary, the Commission finds the proposed revision meets the criteria of Section 16 as it will cause neither substantial reduction in competition nor detriment to commerce. Further, this Final Rule in no way relieves NVOCCs of any other requirements of the Shipping Act, Commission regulations, or the requirements of other statutes and regulations (e.g., the 24-hour Rule) to which they are subject.

IV. Statutory reviews

In accordance with the Paperwork Reduction Act, 44 U.S.C. 3507, the collection of information requirements contained in this Final Rule have been submitted to the Office of Management and Budget ("OMB") for review. The

estimated total annual burden for the estimated 635 annual respondents is 190,252 person-hours. No comments were received on this estimate.

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 605, the Chairman of the Federal Maritime Commission has certified to the Chief Counsel for Advocacy, Small Business Administration, that the Final Rule will not have a significant impact on a substantial number of small entities. Although NVOCCs as an industry include small entities, the Final Rule provides, but does not require, an alternative for NVOCCs from certain tariff requirements of the Shipping Act and the Commission's regulations. It potentially relieves a burden. Therefore, the Commission has found that the Final Rule will have no significant economic impact on a substantial number of small entities.

List of Subjects for 46 CFR Part 531

Exports, Non-vessel-operating common carriers, Ocean transportation intermediaries.

For the reasons set forth in the preamble, the Federal Maritime Commission amends 46 CFR Part 531 as follows:

1. The authority citation for Part 531 continues to read as follows:

Authority: 46 U.S.C. app. 1715.

2. Revise paragraph (o) of § 531.3 to read as follows:

§ 531.3 Definitions.

* * * * *

(o) NSA shipper means a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, a shippers' association, or an ocean transportation intermediary, as defined in

section 3(17)(B) of the Act, that accepts responsibility for payment of all applicable charges under the NSA.

* * * * *

3. Revise paragraph (a) of § 531.5 to read as follows:

§ 531.5 Duty to file.

(a) The duty under this part to file NSAs, amendments and notices, and to publish statements of essential terms, shall be upon the NVOCC acting as carrier party to the NSA.

* * * * *

4. Revise paragraph (c)(2) and add paragraph (d)(4) to § 531.6 to read as follows:

§ 531.6 NVOCC Service Arrangements.

* * * * *

(c) * * *

(2) Make reference to terms not explicitly contained in the NSA itself unless those terms are contained in a publication widely available to the public and well known within the industry. Reference may not be made to a tariff of a common carrier other than the NVOCC acting as carrier party to the NSA.

* * * * *

(d) * * *

(4) No NVOCC may knowingly and willfully enter into an NSA with an ocean transportation intermediary that does not have a tariff and a bond, insurance, or other surety as required by sections 8 and 19 of the Act.

* * * * *

By the Commission.

Karen V. Gregory
Assistant Secretary